IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1115

IN THE MATTER

OF

The Petition of ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

BRIEF OF THE APPELLANT

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Opinions Below

The majority and minority opinions (5 to 2) of the Court of Appeals on reconsideration ordered by this Court, *Matter of Lalli,* 431 U.S. 911 are reported at 43 N.Y. 2d 65 (Jurisdictional Statement, No. 77-1115, Appendix A, pp. A1-A9), dissent commencing at p. 70. The prior opinion of the Court of Appeals is reported at 38 N.Y. 2d 77 (Jurisdictional Statement No. 75-1142, Appendix A, pp. A1-A7).

The opinion of the Surrogate's Court of Westchester County is not reported. (Jurisdictional Statement, No. 77-1115, Appendix B, pp. B1B-10).

Jurisdiction

The judgment of the Court of Appeals of New York, affirming the decree of Surrogate's Court of Westchester County which dismissed the petition for compulsory accounting and upheld the constitutionality of Section 4-1.2 of Estates, Powers and Trusts Law, upon remand for further consideration ordered by this Court was entered on November 17, 1977. Notice of Appeal was filed on January 6, 1978. The Jurisdictional Statement was filed in this Court on February 8, 1978. On March 20, 1978, probable jurisdiction was noted.

The jurisdiction of the Court to hear this appeal is conferred by Title 28, United States Code, § 1257(2).

Constitutional Provision and Statute Involved

Constitutional Provision

United States Constitution, Amendment XIV,

> "§ 1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Statute

Estates, Powers and Trusts Law § 4-1.2, 17B. McKinney's Consolidated Laws of New York, 531-532:

> "§ 4-1.2 *Inheritance by or from illegitimate persons*
>
> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).
>
> (4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.
>
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father

inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

Other Material Statutes

The juxtaposition of the above quoted statute with the other pertinent statutes, reflecting the public policy of New York additionally emphasizes the discrimination:

"1. Estates, Powers and Trusts Law § 5-4.4, 17B, McKinney's Consolidated Laws of New York, 932, as amended by 1975-1976 Pocket Part, page 146:

§ 5-4.4 *Distribution of damages recovered*

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the

surrogate of the county in which letters were issued....

"2. Estates, Powers and Trusts Law § 4-1.1, 17B, McKinney's Consolidated Laws of New York, 476-477, as amended by 1975-1976 Pocket Part, pages 70-71:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

(1) A spouse and children or their issue, money or personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

(2) A spouse and only one child, or a spouse and only the issue of one deceased child, money or personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes....

"(b) If the distributees of the decedent are in equal degree of kinship to him, their shares are equal.

(c) There is no distribution per stirpes except in the case of the decedent's issue, brothers or sisters and the issue of brothers or sisters.

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(e) Distributees of the decedent, conceived before his death but born alive thereafter, take as if they were born in his lifetime.

(f) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(g) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

"3. Family Court Act § 517, 29A, Part 1, McKinney's Consolidated Laws of New York, 249:

§ 517. *Time for instituting proceedings*

(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support.

(b) If the petitioner is a public welfare official, the proceeding may be originated not more than ten years after the birth of the child.

"4. Family Court Act § 417, 29A, Part 1, McKinney's Consolidated Laws of New York, 146:

§ 417. *Child of ceremonial marriage*

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of

this article regardless of the validity of such marriage.

"5. Domestic Relations Law § 24, 14, McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part, 28:

§ 24. *Effect of marriage on legitimacy of children*

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding."

Question Presented

Does Estates, Powers and Trusts Law § 4-1.2, providing that an illegitimate child is the legitimate child of his father only if an order of filiation is issued in a proceeding

instituted in the lifetime of the father during pregnancy of the mother or within two years from the birth of a child in juxtaposition with other pertinent statutes reflecting public policy of New York, violate Equal Protection and Due Process Clauses of Amendment XIV to the Constitution of the United States, in its application to a child, born out of wedlock, whose natural parents prior or subsequent to the birth of such child have not entered into a civil or religious marriage nor have consummated a common law marriage, and for whom no order of filiation was entered, and who was acknowledged by the deceased father as his son in a writing acknowledged before a notary and partially supported by his father, in preventing such child from sharing in his father's intestate estate or proceeds of recovery in a wrongful death action against the confessed murderer of his father?

Statement

The decedent, Mario Lalli, was murdered on January 7, 1974. (Appendix, pp. A7, A28) He was married to Rosamond Lalli, the administratrix and appellee, about 34 years (Appendix, p. A7). Robert M. Lalli, the appellant, and his sister, Maureen Lalli, were born respectively on August 24, 1948 and March 19, 1950, to the decedent and Eileen Lalli, who predeceased him (Appendix, pp. A15, A16). Robert M. Lalli, the appellant, was acknowledged by the decedent as "my son" in a certificate of consent to his marriage in a writing duly acknowledged before a notary (Appendix, p. A14) and was supported by the decedent (Appendix, pp. A11-A12, A17), who even bought a house "for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting" (Appendix, p. A26). The appellant also worked for his father, the decedent herein, and was paid for such work by checks (Appendix, p. A12); so when the decedent was murdered, the appellant lost not only his father, but his financial support and means of livelihood as well.

There are no factual disputes. The Court of Appeals in its original opinion, 38 N.Y. 2d 77, 79 stated:

> "It was not contested that during his lifetime the decedent had provided financial support for both appellant and his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public * * * "

The appellant, Robert M. Lalli, and his sister, Maureen Lalli are natural children, born out of wedlock, and no order of filiation was ever entered. (Appendix, pp. A3, A8)

There is no claim that prior or subsequent to the birth of those children their natural parents have entered into a civil or religious marriage, or have consummated a common law marriage.

On August 26, 1974, Robert M. Lalli, the appellant, filed a petition seeking a compulsory accounting and although the appellee originally answered, she thereafter served a notice of motion to dismiss on October 1, 1974 on the ground that under Estates, Powers and Trusts Law § 4-1.2 the appellant was not a distributee. The appellant opposed the application on the ground that the statute violated Equal Protection and Due Process Clauses of the XIVth Amendment and New York State Constitution, thus raising the federal question sought to be reviewed. The Surrogate

granted the motion upholding the statute by the decree entered November 26, 1974 (Jurisdictional Statement, No. 77-1115, Appendix D, pp. D1-D2). The Court of Appeals affirmed by the final judgment entered November 25, 1975. This Court vacated said judgment and remanded for further consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762 (1977). (*Matter of Lalli,* 431 U.S. 911.) On remand the Court of Appeals adhered to its prior decision by final judgment entered November 17, 1977, in a 5 to 2 decision. This Court noted probable jurisdiction on March 20, 1978.

POINT I

Estates, Powers and Trusts Law § 4-1.2 is unconstitutional under Amendment XIV for failure to adopt a middle ground between the extremes of complete exclusion and case by case determination of paternity in the light of *Trimble* v. *Gordon*, 430 U.S. 762.

This Court vacated prior judgment of the Court of Appeals, 38 N.Y.2d 77 (Jurisdictional Statement No. 75-1148, Appendix C, pp. C1-C3) and remanded this case for further consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762. It is significant therefore what was said in that case:

> "We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the

> orderly settlement of estates or the dependability of titles to property passing under intestate laws. Because it excludes these categories of illegitimate children unnecessarily, § 12 is constitutionally flawed." (430 U.S. 762, 770-771).

In addition, this Court clearly indicated acceptable guidelines, saying:

> "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. 772N. 14)"

In our case the fact pattern fits into the guidelines for we have an acknowledgement of paternity in writing duly acknowledged before a notary. (Appendix, p. A14)

The real question faced by the New York Judges on reconsideration was whether our case of an illegitimate son acknowledged as son in a writing duly acknowledged came within the orbit of *Trimble* v. *Gordon,* 430 U.S. 762 or could be distinguished from it.

The gist of *Trimble* v. *Gordon,* 430 U.S. 762, 767, 770-773, 774, is:

> " * * * Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than

strictest scrutiny,' Lucas also establishes that the scrutiny 'is not a toothless one,' id., at 510, 96 S.Ct., at 2764, a proposition clearly demonstrated by our previous decisions in this area.

" * * * The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinoiis Supreme Court gave inadequate consideration to the relation between Sec. 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, Sec. 12 is constitutionally flawed.

"The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are

alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

"The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area. Our previous decisions demonstrate a sensitivity to 'the lurking problems with respect to proof of paternity,' Gomez v. Perez, 409 U.S. 535, 538, 93 S. Ct. 872, 875, 35 L.Ed.2d 56 (1975), and the need for the States to draw 'arbitrary lines . . . to facilitate potentially difficult problems of proof,' Weber, 406 U.S., at 174, 92 S.Ct., at 1406. 'Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.' Gomez, 409 U.S., at 538, 93 S.Ct., at 875. Our decision last Term in Mathews v. Lucas, supra, provides especially helpful guidance.

"In Lucas we sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits. One of the statutory conditions of eligibility was dependency on the deceased wage earner. 427 U.S., at 498, and n. 1, 96 S.Ct., at 2758. Although the Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court upheld the statutory classifications, finding them 'reasonably related to the likelihood of dependency at death.' Id., at 509, 96 S.Ct., at 2764. Central to this decision was the finding that the 'statute does not broadly discriminate between legitimates and illegitimates without more,

but is carefully tuned to alternative considerations.' Id., at 513, 96 S.Ct., at 2766.

"Although the present case arises in a context different from that in Lucas, the question whether the statute 'is carefully tuned to alternative considerations' is equally applicable here. We conclude that Sec. 12 does not meet this standard. Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The facts of this case graphically illustrate the constitutional defect of Sec. 12. Sherman Gordon was found to be the father of Deta Mona in a state court paternity action prior to his death. On the strength of that finding, he was ordered to contribute to the support of his child. That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances. 14 The reach of the statute extends well beyond the asserted purposes. See Jimenez v. Weinberger, 417 U.S. 628, 637, 94 S.Ct. 2496, 2502, 41 L.Ed.2d 363 (1974).

"* * * The Illinois Supreme Court also noted that the decedents whose estates were involved in the consolidation appeals could have left substantial parts of their estates to their illegitimate children by writing a will. * * *

"* * * By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the

essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. * * *

"* * * The opinion in Reed gives no indication that this available alternative had any constitutional significance. We think it has none in this case."

This Court in addition gave some illustrations of what it had in mind by stating in a footnote 14 the following:

"14. Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." (430 U.S. 772)

We respectfully submit that the significance of *Trimble* v. *Gordon*, 430 U.S. 762 is that an illegitimate child has under Amendment XIV the same right to inherit as a legitimate child subject to proof of paternity, but in our case there can be no question as to paternity for same is clearly conceded. Matter of *Estate of Lalli*, 38 N.Y.2d 77, 79 (Jurisdictional Statement No. 75-1148, Appendix A, pp. A2-A3).

The New York majority attempts to distinguish our case from the Illinois statute on latter's:

"* * * requirement that the family relationship be 'legitimatized' by the subsequent marriage of the

parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity. The Supreme Court held unacceptable such a statutory provision which penalized children born of an 'illegitimate relationship' between their parents —concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

"In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be 'acknowledged by the father as the father's child.' New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation." *Matter of Lalli,* 43 N.Y.2d 65, 68, (Jurisdictional Statement No. 77-1115, Appendix A, pp. A2-A3)

But the learned New York majority were closing their eyes, refusing to recognize and completely ignoring the argument of the appellant that a New York Statute, Domestic Relations Law § 24, 14 McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part 28 (This Brief, p. 7) makes legitimate as to both natural parents a child:

> "* * * heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common law marriage * * *

> notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void * * *"

Thus under the plain wording of the New York statute a child born out of wedlock for whom no order of filiation was entered but whose parents went through a marriage ceremony no matter how tainted, no matter how criminal, i.e. bigamous, would by virtue of that marriage ceremony be rendered legitimate without an order of filiation.

We respectfully submit that, therefore, there is no distinction between the laws of New York and Illinois in deference to a marriage ceremony. New York, in their eagerness to compel marriage, gives greater rights on the one hand to offspring whose natural parents committed bigamy, apparently on the theory that a greater rascal is the father, the better for his issue; and on the other hand interposes an impenetrable barrier of order of filiation during lifetime of the father, where there is no marriage, no matter how improper.

Illinois, where there is a marriage, pays some attention to a proof of paternity, requiring an acknowledgment of paternity. § 12 of the Illinois Probate Act, provides:

> "* * * An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate";

but New York apparently dispenses with any proof of paternity in such a case, substituting a marriage ceremony for a proof of paternity, without providing any other guide lines. If anything, a comparison of the limitation in the last 40 words of subparagraph (a)(2) commencing with the word "if" of Estates, Powers and Trusts Law § 4-1.2 (This Brief, p. 3) with Domestic Relations Law

Sec. 24 (This Brief, p. 7) clearly reveals in the former an even more invidious discrimination than that which led this Court to flaw the Illinois statute in *Trimble* v. *Gordon,* 430 U.S. 762. See Point II of this brief, pp. 23-27.

We agree with the New York majority that Fourth Report of Commission on Estates, State of New York, Legislative Document 1965 No. 19, pp. 176-204 suggesting amelioration with some safeguards of the harsh rule of *nullius filius* is not relevant as showing New York public policy underlying Estates, Powers and Trusts Law, § 4-1.2 in the light of New York public policy revealed by Domestic Relations Law, § 24. Unfortunately, New York did not go far enough as to some illegitimates.

However, New York legislature was not ignorant of acknowledgment and support in dealing with children born out of wedlock. Family Court Act, § 517 (This Brief, p. 6), imposes a bar to paternity proceedings

> "after the lapse of more than two years from the birth of the child, *unless paternity has been acknowledged by the father in writing or by furnishing support.*" (Emphasis by us)

This Court, in *Trimble* v. *Gordon,* 430 U.S. 762, in note 14 said, in part:

> "* * * Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity * * *";

but the juxtaposition of Estates, Powers and Trusts Law, § 4-1.2 (This Brief, p. 3) on the one hand, and Domestic Relations Law, § 24 (This Brief, p. 7) together with Family Court Act § 417 (This Brief, p. 6) and

§ 517 (This Brief, p. 6) particularly the portion quoted above on the other hand clearly shows that the requirement of order of filiation during the lifetime of the father is far in excess of those "carefully tuned to alternative considerations," *Trimble* v. *Gordon,* 430 U.S. 762, 767, 770-773, 774.

This Court, in *Dunn* v. *Blumstein,* 405 U.S. 330, 347 said:

> "* * * At the outset, the State is faced with the fact that it must defend two separate waiting periods of different lengths. *It is impossible* to see how both could be 'necessary' to fulfill the pertinent state objective. *If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as 'necessary' to achieve the same* purpose. * * *" (Emphasis by us)

Thus, there is a New York Legislative Declaration that an acknowledgment in writing by a father is sufficient to eliminate the time limitation bar. This declaration in effect brands denial of right to inherit to illegitimates acknowledged in writing by a deceased father as "invidious discrimination", for legislature having determined that an acknowledgment by a father in writing was sufficient proof of paternity for some purposes, the state could not require more for the right to inherit.

Incidentally in our case we have both acknowledgment in writing (Appendix, p. A14) and support. (Appendix, pp. A11-A12, A17).

Judge Cooke in a dissent joined by Judge Fuchsberg in the Court of Appeals (43 N.Y.2d 65, 70-73) says:

> "Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United

States is significantly different from the New York statute (EPTL 4-1.2, subd [a], par [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762). * * *

"Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's 'proper objective of assuring accuracy and efficiency in the disposition of property at death' (430 U.S., at p 770). Of course, our statute is not mindless nor totally irrational and a concern for a solid proof of paternity is a legitimate State purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

"A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order

will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

"The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Ct Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the 'middle ground' of what a State may legitimately require and settles on the side of complete exclusion.

"In *Trimble,* the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity for purposes of allowing an illegitimate child to inherit from a father who dies in-

testate (see 430 U.S., at p. 772)* However, the court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a *sine qua non* requirement that an order of filiation be obtained during the lifetime of the father (EPTL 4-1.2, subd [a] par [2]) for this reason, in light of *Trimble* our statute fails to pass constitutional muster. * * *" (Jurisdictional Statement No. 77-1115, Appendix A, pp. A5-A9)

The problem of children born out of wedlock has proliferated in recent times due to the advent of modern morality, living together without benefit of clergy, and the pill. The *Miami Herald* (Florida) of March 31, 1978, p. 2A, says in part:

"* * * the trend of couples living together without marriage. An estimated one million such couples are on the American scene * * *".

The number of such children has reached large numbers. Typical of this increase are the statistics of the New York City Department of Health showing that 30.2% of all infants born in New York City in 1976 were illegitimate, an increase from 6.7% in 1956, and 14.8% in 1966. During the same 20-year period ending in 1976, out-of-wedlock births in New York City have nearly tripled, while legitimate births were cut in half. (*New York Times,* September 29, 1977.) The law should respond to their needs:

"* * * In this perpetual flux, the proble[illegible] which confronts the judge is in reality a two fold one: * * * he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die. * * *" *Benjamin N. Cardozo, The Nature of the Judicial Process,* p. 28:

See also *Eckel* v. *Hassan,* 61 A.D.2d 13, 18, where it was said in part

"* * * continuing surge in the courts to ameliorate the hitherto invidious discrimination directed against 'illegitimate' children claiming through a putative father * * *"

It is respectfully submitted, therefore, that § 4-1.2 of the Estates Powers and Trusts Law "is constitutionally flawed" "because it it excludes those categories of illegitimate children unnecessarily. *Trimble* v. *Gordon,* 430 U.S. 762, 770-773."

POINT II

Absence of a marriage of the natural parents in our case in juxtaposition of New York statutes proves discrimination and bias of § 4-1.2 of the Estates Powers and Trusts Law.

In its two opinions the Court of Appeals refused to take notice and completely ignored the argument of the appellant that a marriage was a missing fact in our case creating invidious discrimination when various provisions of the New York statutes are compared.

Under § 4-1.2 of the Estates Powers and Trusts Law a child to inherit from his natural father is required to have an order of filiation secured during the lifetime of the father or be forever barred from participating in the estate. At least that is the impression created by the two opinions of the Court of Appeals, 38 N.Y.2d 77 (Jurisdictional Statement No. 75-1148, Appendix A pp. A1-A7) and 43 N.Y.2d 65 (Jurisdictional Statement No. 77-1115, Appendix A pp. A1-A5) but is that the true situation under the provisions of New York Statutes?

The appellant on both occasions attempted unsuccessfully to call to the attention of that Court that the major premise assumed by the Court of Appeals has no foundation in fact for § 4-1.2 of the Estates Powers and Trusts Law does not apply to all children born out of wedlock, but only to *some* of them, and that such fact in and of itself constitutes denial of equal protection of the law under Amendment XIV and is discrimination.

Domestic Relations Law § 24 expressly provides that

> "a child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage * * * is the legitimate child of both natural parents * * *" (This Brief p. 7)

and to gild the lily to compel a marriage even more, even if a crime results, the New York Legislature added the words:

> "* * * notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void. * * *" See also Family Court Act § 417 (This Brief, p. 6).

The New York majority attempts to distinguish our case from *Trimble* v. *Gordon,* 430 U.S. 762 as showing no hostility to illegitimate or undue preference to those illegitimates whose natural parents went through a marriage ceremony, but the court must have had a tongue in cheek in view of the above quoted statutes on which it failed and refused to comment.

It is worthy of note that although Illinois statute requires in addition to a marriage "who is acknowledged by the father", New York statute provides no guide lines for any proof of paternity, substituting the claim of marriage for proof of paternity no matter how nebulous.

We respectfully submit that our statute just as the Illinois "statute was enacted to ameliorate the harsh common law rule under which an illegitimate child was *filius nullius* and incapable of inheriting from anyone", *Trimble* v. *Gordon,* 430 U.S. 762. *See Fourth Report State of New York Commission on Estates* 176-203, and that same rule should apply for New York just as Illinois and that both did not go far enough.

Thus New York statutes when taken together create two categories of children born out of wedlock, on one hand are placed such whose natural parents entered into a marriage as to whom a marriage is substituted for proof of paternity, and on the other hand are placed such as in our case, where a requirement of an order of filiation in lifetime of father erects an "insurmountable barrier" no matter the strength of the proof of paternity.

This court in *Jimenez* v. *Weinberger* 417 U.S. 628, 635-637 (1974) dealt with a similar situation in another context.

> "From what has been outlined it emerges that afterborn illegitimate children are divided into two subclassifications under this statute. One subclass is made up of those (a) who can inherit under state intestacy laws, or (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage. These children are deemed entitled to receive benefits under the Act without any showing that they are in fact dependent upon their disabled parent. The second subclassification of afterborn illegitimate children includes those who are conclusively denied benefits because they do not fall within one of the foregoing categories and are not entitled to receive insurance benefits under any other provision of the Act.

"We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellants' subclass, as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses. * * *

" * * * Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is 'overinclusive' in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this

record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment. Schneider v. Rusk, 377 US 163, 168, 12 L Ed 2d 218, 84 S Ct 1187 (1964); Bolling v. Sharpe, 347 US 497, 499, 98 L Ed 884, 74 S Ct 693 (1954)."

We respectfully submit that § 4-1.2

"because it excludes those categories of illegitimate children unnecessarily . . . is constitutionally flawed." *Trimble* v. *Gordon*, 430 U.S. 762.

POINT III

The appellant is entitled to an accounting by administratrix as to wrongful death action.

The decedent has been murdered " * * * by the confessed killer, William Lalli * * * " (Appendix, p. A28). The appellant having been supported by the decedent at the time of his death (Appendix, pp. A11-A12, A17) regardless of the right of the appellant to participate in the distribution of the estate he had a right to participate in the proceeds of a wrongful death action and to an accounting for same from the respondent.

In *Holden* v. *Alexander*, 39 App. Div. 2d 476, 336 N.Y.S. 2d 649, 651, 655, the court said in part:

"EPTL 5-4.4 states, *inter alia*, that an action may be maintained to recover damages for wrongful death

by 'the personal representative, duly appointed in this state * * * *who is survived by distributees.* (Emphasis added) Pursuant to subdivision (a) of EPTL 5-4.4, the damages recoverable in such an action are solely for the benefit of the distributees of the decedent who are determined by reference to EPTL 4-1.1 which governs the order of inheritance in intestacy. * * *

"* * * In furtherance of the above findings, EPTL 4-1.2 (subd. [a], par. [2], and subd. [b]) is hereby declared unconstitutional *as applied and limited* to the specific facts of the case at bar (see Prudential Ins. Co. v. Hernandez, *supra*), as setting up an invidious discrimination between legitimates and illegitimates by requiring that an order of filiation be entered before an illegitimate or its father may be treated as a distributee of the other * * *

"To hold otherwise would seem not only to create a windfall for tortfeasors who happen to be fortunate enough to have committed their tortious acts against illegitimates (Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441, *supra*), but also to render a gross injustice to this particular plaintiff, who would have suffered a wrong without being provided any remedy."

This decision is in accord with the prior rulings of this Court as to the distribution of proceeds of a wrongful death action to children born out of wedlock: *Glona* v. *American Guarantee & Liability Insurance Company* (1968), 391 U.S. 73; *Levy* v. *Louisiana* (1968), 391 U.S. 68; and *Weber* v. *Aetna Casualty & Surety Company* (1972), 406 U.S. 164.

New York Legislature in deference to those decisions has since amended Estates, Powers and Trusts Law by adding § 5-4.5 to give a right to proceeds of death action to such as the appellant and this statute was given retroactive effect in *Eckel* v. *Hassan,* 61 A.D. 2d 13.

Yet, although the appellant had a right to an accounting at least to the extent of the proceeds of the wrongful death action or to be compensated for the neglect to secure same, the Court of Appeals completely ignored the contentions in this respect, just as it ignored POINT II, *supra.*

POINT IV

The discrimination against the appellant is a denial of due process to him.

We submit that the same argument as to Equal Protection applies equally to Denial of Due Process.

POINT V

The judgment should be reversed with costs, § 4-1.2 declared unconstitutional and an accounting decreed.

Respectfully submitted,

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